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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942 1943

No. 105

EASTERN-CENTRAL MOTOR CARRIERS ASSOCIATION, MIDDLE ATLANTIC STATES MOTOR CARRIER CONFERENCE, AND CENTRAL STATES MOTOR FREIGHT BUREAU, INC.,

Appellants.

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT AS TO JURISDICTION.

CHARLES E. COTTERILL,
Counsel for Appellants.

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UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 19-390

EASTERN-CENTRAL MOTOR CARRIERS ASSOCIATION, ET AL.,

Plaintiffs,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Defendants.

STATEMENT OF JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

This action was instituted in the United States District Court for the Southern District of New York to annul, set aside and enjoin enforcement of an order of the Interstate Commerce Commission under United States Code and Sup. II. Title 28, Secs. 41 (27) and (28), 43, 44, 45, 45a, 46, 47, 47a, and 48. A statutory-three-judge court was convened to hear and decide the case and it entered its judgment March 5, 1943. In that said judgment it was ordered that the petition be dismissed. On March 6, 1943, petition for rehearing by that statutory court was filed. On March 17, 1943, the petition for rehearing was denied and the order of denial thereby became the final order of the court as of that date. Notice of appeal to the Supreme Court of the United States was given April 21, 1943, petition for appeal was filed May 5, 1943, and the order allowing appeal was signed May 6, 1943.

Jurisdiction of the Supreme Court of the United States to entertain this appeal direct from the District Court for the Southern District of New York arises from Secs. 210 (28 U. S. C. A. Sec. 47a) and 238 of the Judicial Code as amended (28 U. S. C. A. 345).

The assailed order of the Interstate Commerce Commission was affirmative in form and substance; and direct appeal to the Supreme Court arises from the decision and order of the District Court refusing to set aside, annul and enjoin enforcement of the Commission's order (*Alton Railroad Co.* v. *U. S.*, 315 U. S. 15; *Rochester Telephone Corp.* v. *U. S.*, 307 U. S. 125).

Accompanying this statement of jurisdiction of the Supreme Court of the United States is a copy of the opinion in the cause rendered by the District Court for the Southern District of New York. That opinion does not reveal the grounds upon which the plaintiff appellants assailed the validity of the order and action of the Interstate Commerce Commission. The opinion of the District Court for the most part merely paraphrases the opinion of the Interstate Commerce Commission and concluded with the general determination that the Commission was "right".

By its order here sought to be reviewed the Commission erroneously refused a large number of interstate motor common carriers the right in their tariffs to make available to any individual shipper the option of shipping certain commodities under a mere choice of three different rates from any origin to any destination the choice of any such shipper to be governed only by the quantity of freight tendered by that shipper at one time on one bill of lading from itself to one consignee. While concluding that each of the three sets of rates would be just and reasonable in themselves it was erroneously held by the Commission that the motor carrier offer of the mere choice by any individual shipper would constitute "discrimination between classes

of shippers" in accordance with the shipping weights which they might "tender at one time". There was no evidence before and no finding by the Commission that the range of shipping weights upon which the choice of rates would depend exceeded the ordinary trade units of shipment of the particular commodities or that the choice of rates so offered would in practical effect operate as a device by means of which the lowest of the three rates would be accorded to some shippers and "denied" to others. While the lowest of the three rates, governed by the largest of the three specified minimum shipping weights, would correspond to the competing railroad carload rates and carload minimum weight that circumstance was unlawfully rejected by the Commission as a ground for the motor carrier rate distinction only as a matter of "policy" on the part of the Commission and without any other finding as to why the right to meet the competition did not exist. In upholding the Commission's point of view the court below wrongly considered that because the motor carriers "can afford" the lowest of the three rates they should not be allowed to retain "the larger profit" on the intermediate and slightly higher rate in the absence of a showing that differences in the motor carrier operating expenses existed. The court below also improperly added its own independent expression of judgment, without corresponding findings by the Commission, that it would be "inefficient" for motor carriers to publish a competitive rate conditioned upon the tendering of a quantity of freight somewhat greater than might be loaded in a single motor vehicle, notwithstanding the varieties of sizes of motor vehicles and the operation of state "trade barrier" laws would account for the need to place a small portion of some of the shipments into second vehicles.

CHARLES E. COTTERILL,
Solicitor for Appellants.

May 6, 1943.

APPENDIX "A".

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

C. 19-390.

EASTERN MOTOR CARRIERS' ASSOCIATION, *Plaintiff*,

against

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*

Before: Augustus N. Hand, Circuit Judge, and Clancy and Conger, District Judges.

Charles E. Votterill, Attorney and Counsel for Plaintiff and Supporting Intervenors.

Thurman Arnold, Assistant Attorney General, Robert L. Pierce, Special Assistant to the Attorney General, for the United States.

Nelson Thomas, Attorney for Inerstate Commerce Commission, Daniel W. Knowlton, Chief Counsel, of counsel.

AUGUSTUS N. HAND, Circuit Judge:

This is an action to set aside and enjoin enforcement of an order of the Interstate Commerce Commission which held certain proposed motor carrier tariffs unlawful upon a finding that the rates were unjustly discriminatory to certain shippers. The Commodity to which the rates were to be applied was hard surfaced floor covering. The railroads have a rate of 70% of first-class for shipments of less than 30,000 pounds and 45% of first-class for 30,000 pounds or more. The motor carriers proposed a rate of 45% of first-class on shipments weighing 30,000 pounds or more; a slightly higher rate (47½% of first-class) for shipments weighing between twenty and thirty thousand pounds; and a rate of 70% of first-class on shipments of less than 20,000 pounds.

The Commission referred with evident approval to the prior finding of Division 3 of the Commission which read as follows:

"The Commission has found repeatedly that carload minimum weights should be established by rail carriers with reference to the loading capacity of their freight cars and has condemned minimum weights in excess of the loading possibilities of the rail equipment. The respondents herein have not presented to us a valid reason from the point of view of economy in transportation or otherwise, such as we have found to exist in connection with certain trainload movements, why they should be permitted to establish a minimum weight grater than is physically possible to load in the motor equipment usually used by them, and, in our opinion, no such reason exists. Strictly speaking, the proposed minimum weight of 30,000 pounds is not a truckload minimum weight but rather is a volume minimum weight, which necessitates the use of more than one unit of equipment to load and transport that quantity of linoleum. We adopt as a policy the condemnation as unreasonable of a volume minimum weight, unless it is shown clearly that, as a result thereof, motor carriers can handle the traffic at the volume minimum weight at costs per 100 pounds which are less than the costs incurred at a reasonable truckload minimum weight. The record indictates that a reasonable truckload minimum on linoleum is 20,000 pounds. There is no showing herein that operating economies would result were the proposed rates restricted to apply only when 30,000 pounds are tendered for shipment."

The Commission went on to affirm prior findings of Division 3 that proposed rates of 45 and 47.5 per cent of first-class are not unjust or discriminatory except to the extent that the proposed rates, 45 per cent of first-class, are subject to a minimum of 30,000 pounds.

It made further findings as follows:

"We further find that the proposed rates, minimum 30,000 pounds, would give an unjust advantage to shippers of 30,000-pound lots and be unjustly discriminatory to shippers of 20,000-pound lots.

"As previously indicated, a check of the tariffs discloses that respondents' present rates are either 45 per cent of first class, minimum 20,000 pounds, or 47.5 per cent of first class, minimum 20,000 pounds. As respondent's present bases of rates do not appear to be unjust, unreasonable, or unjustly discriminatory, no order for the future is necessary."

The difficulty with adoption of a rate of 45 per cent on a minimum of 30,000 pounds, when that rate is not allowed to smaller shippers, seems to be that it has no relation to the business of the motor carriers, for they have made no showing of any saving when carrying more than 20,000 pounds. Nor have they showed that a 45 or 47½ per cent rate, or some intermediate rate, for anything beyond 20,000 pounds would not enable them to maintain reasonable competition with the railroads.

The finding that rates of either 45 or 47½ per cent of first-class, minimum 20,000 pounds, would not in themselves be unreasonable does not negative the finding of an unjust advantage to shippers of 30,000 pound lots in cases where shippers of 20,000 pound lots are not given the same treatment. If motor carriers can make money either at 45 or 47½ per cent of first-class, it would seem that the Commission might reasonably require that the advantage given to the larger shippers of over 30,000 pounds should be shared with the smaller shippers of less than 30,000 pounds, since there is no showing that such sharing would work to the unreasonable disadvantage of the carriers, and it clearly would give the smaller shippers the benefit of the lower rate which the larger shippers would enjoy.

As we have already suggested, the proposal of a 45 per cent rate for shipments in excess of 30,000 pounds has no apparent relation to the business needs or the convenience of transportation of the motor carriers. It is a mere adoption on a volume basis of rates for railroad carload lots which have been sanctioned in the case of rail carriers. It is evidence that the motor carriers are attempting to compete with the railroads on rates for large shipments and at the same time to make additional profits on smaller shipments by the 47½ percent rate. Competition between rail

and motor carriers may be entirely legitimate, and indeed desirable, provided a greater equality in rates can be preserved between the smaller and the larger shippers. The extent to which competition should be recognized in arriving at just rates is, within reasonable limits, a matter for the expert judgment of the Commission. It does not in itself necessarily determine whether a rate is preferential under Section 3 of the Interstate Commerce Act or unreasonable under Section 1(5). It is a matter to be given weight by the Commission, rather than an absolute defense. I. C. C. *v.* Alabama Midland Ry., 168 U. S. 144, 166; United States *v.* Illinois Central R. Co., 263 U. S. 515.

The effect of requiring the motor carriers to fix a single low minimum quantity adapted to their equipment is to oblige them, if they are to meet railroad competition, to extend to smaller shippers the advantages of the competitive rate. No reason is advanced why this should not be done in this case. The 45 per cent rate is found to be reasonable and compensatory; there is nothing to show that hardship would result to the carriers from extending a 45 per cent rate, or one between 45 per cent and 47½ per cent, to small shippers as well as to large ones. It appears to us that in deciding this case the Commission has met the requirements of Section 216 (i) of the Motor Carrier Act in that it has given "due consideration * * * to the inherent advantages of transportation by such carriers, (and) * * * to the need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service * * *". Its disposition of the proceeding before it was right and should be affirmed.

Submit proposed findings upon ten days' notice.

Judgment for the defendants, dismissing the complaint.

AUGUSTUS N. HAND,
U. S. C. J.

EDWARD A. CONGER,
U. S. D. J.

JOHN W. CLANCY,
U. S. D. J.